IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1924.

No. 622.

VINCENT L. KNEWELL, AS SHERIFF OF MINNEHAHA COUNTY, SOUTH DAKOTA, APPELLANT,

vs.

GEORGE W. EGAN.

MOTION TO INTERVENE.

Comes now the State of South Dakota, by its Attorney-General and also its other attorneys, and respectfully petitions the court for leave to intervene as one of the party plaintiffs in the above case, by reason of its interest therein and its having prosecuted the case through its attorneys

continuously to the present date. And petitioners will ever pray, etc.

Respectfully submitted,

BUELL F. JONES,
Attorney-General of South Dakota.
BYRON S. PAYNE,
SAMUEL HERRICK,
Attorneys for State of South Dakota.

MEM.—In support of this motion there is filed the affidavit of Byron S. Payne, Esq., former Attorney-General of South Dakota and one of the attorneys of record for the appellant in this case. Reference is also had to State *v.* Gordon, (105 Miss., 454); State *ex rel.* Keyes *v.* Buckham, 29 Minn., 462; In *re* Medley, 134 U. S., 160; In *re* Bonner, 151 U. S., 242; Colman *v.* Tennessee, 97 U. S., 509; In *re* Christian, 42 Fed., 199, 204; State *v.* Huegin, 110 Wis., 189; and to the note in 19 A. L. R., 385-405.

(23)

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1924.

No. 622

VINCENT L. KNEWELL, AS SHERIFF OF MINNEHAHA COUNTY, SOUTH DAKOTA, APPELLANT,

vs.

GEORGE W. EGAN.

THIS PAMPHLET PRESENTS

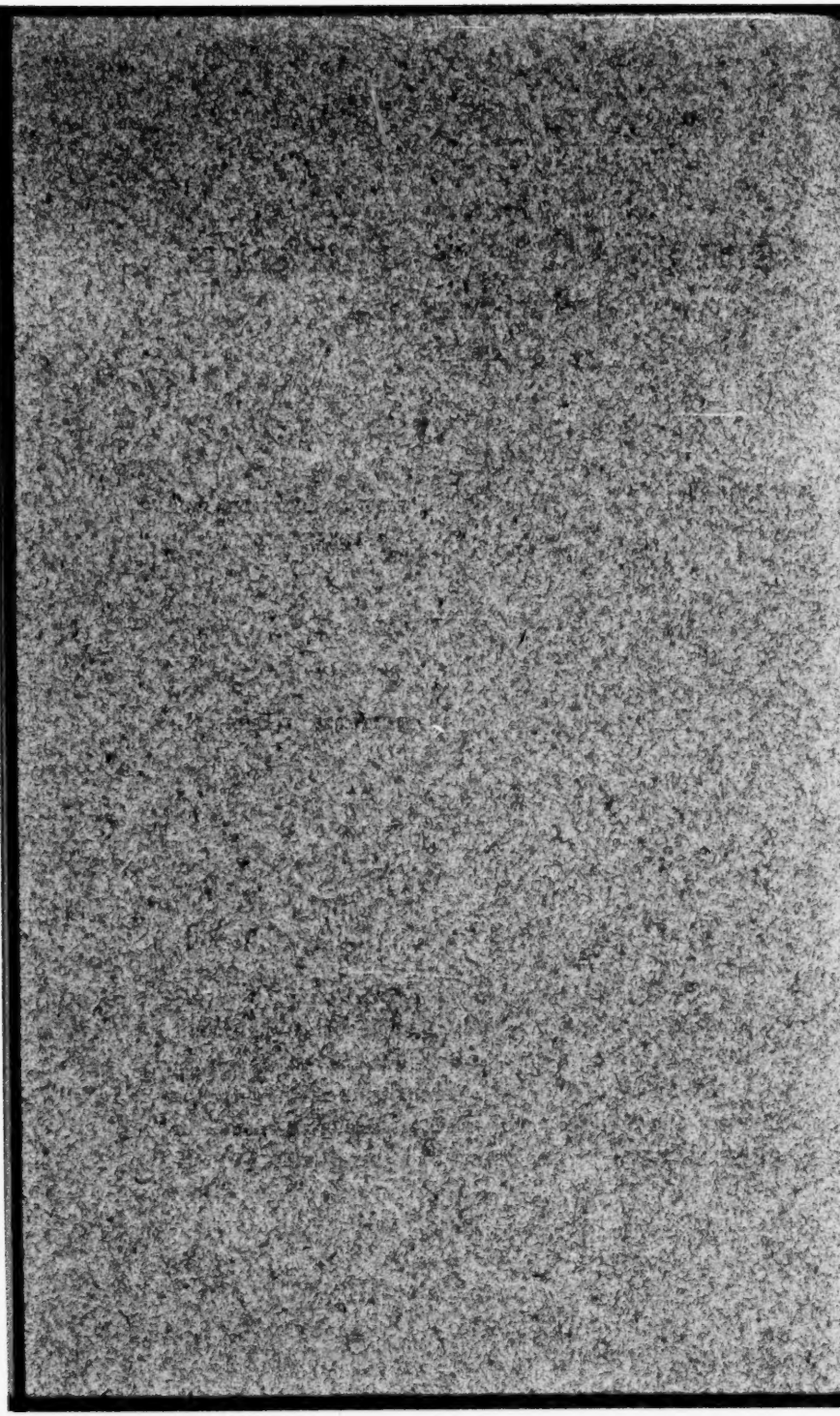
I. Motion to File and Adopt Assignments of Error.

II. Affidavits of J. D. Coon and Hugh Gamble in Opposition to Motion to Dismiss.

III. Consent of George Boardman as Sheriff to be Substituted as Appellant.

IV. Statement in Opposition to Motion to Dismiss.

BUELL F. JONES,
Attorney General of South Dakota.
BYRON S. PAYNE,
SAMUEL HERRICK,
Attorneys for Appellant, State of South Dakota, and for George Boardman as Sheriff of Minnehaha County, S. Dak.



IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1924.

No. 622

VINCENT L. KNEWELL, AS SHERIFF OF MINNEHAHA COUNTY, SOUTH DAKOTA, APPELLANT,

vs.

GEORGE W. EGAN.

I. Motion to File and Adopt Assignments of Error.

Come now the State of South Dakota, by its Attorney General and also its other attorneys, and also George Boardman as Sheriff of Minnehaha County, South Dakota, by his counsel, and respectfully petition the Court for leave to file and adopt the Assignments of Error made a part of the record on the part of Vincent L. Knewell as Sheriff of Minnehaha County, South Dakota, in this appeal, such Assignments of Error being found in the printed record on pages 106 to 108, inclusive, and to file and adopt such Assignments of Error as Assignments of Error for them respectively in this cause. This Motion is made in connection with the Motion of the State of South Dakota heretofore made, for leave to intervene in this cause, and this Motion is to be

considered in connection with said Motion to Intervene, and in connection with the other matters submitted in support of said Motion to Intervene. The State of South Dakota and George Boardman as Sheriff of Minnehaha County, South Dakota, hereby offer to furnish a new and further appeal bond in this cause, or to furnish such undertaking as may be prescribed by the Court to relieve the original appellant Vincent L. Knewell as Sheriff of Minnehaha County, South Dakota, from liability on his appeal bond, or to indemnify him for any liability he may be compelled to respond to by reason of such appeal bond. And petitioners will ever pray, etc.

Respectfully submitted,

BUELL F. JONES,
Attorney General of South Dakota.
BYRON S. PAYNE,
SAMUEL HERRICK,
Attorneys for State of South Dakota, and for George Boardman as Sheriff of Minnehaha County, S. Dak.

II. Affidavit of J. D. Coon.

J. D. Coon, being first duly sworn, on oath deposes and says, that he is a resident of Sioux Falls, South Dakota; that he is the State's Attorney of Minnehaha County, South Dakota; that he took office as such State's Attorney on the 6th day of January, 1925; that he received from Byron S. Payne, Attorney at Law, of Pierre, South Dakota, a letter under date of January 6, 1925, in which was enclosed the original letter from the Clerk of the Supreme Court of the United States written to Byron S. Payne, Pierre, South

Dakota, on January 2, 1925; that in this letter from the Clerk of the Supreme Court there were recited the facts about the receiving from Mr. Knewell of a Motion to Dismiss the Appeal in the case of Knewell *vs.* Egan, No. 622, of the October Term, 1924.

That on the 16th day of January, 1925, at 3 o'clock p. m., at the request of the affiant, Mr. Vincent L. Knewell called at the office of Coon & Coon, in the Union Savings Building, Sioux Falls, South Dakota; that in the presence of J. M. Coon, brother and partner of affiant, affiant talked with Mr. Knewell, about the case in which he is a party, as Sheriff of Minnehaha County, South Dakota; affiant presented Mr. Knewell with the letter from the Clerk of the Supreme Court, above mentioned, and asked for an explanation.

Affiant further states that Mr. Vincent Knewell stated in response to affiant's inquiry, that he, Vincent L. Knewell, did sign a Motion to Dismiss the appeal of the case of *Vincent L. Knewell vs. Egan*. Mr. Knewell stated that while the Salinger case was being tried in Sioux Falls, South Dakota, in the Federal Court, which was during the month of November, that Ben Salinger, Sr., and George Egan talked to him (Knewell), and told him he would be liable for the costs in the above named case in the event that Mr. Egan should win and that Mr. Salinger prepared the Motion to Dismiss and Mr. Knewell signed it and that Mr. Salinger told Knewell that he was going to Washington immediately after the trial of the case of Ben Salinger, Jr., and that he would take the Motion to Dismiss and personally present it to the Clerk of the Supreme Court, and so far as he knows that was done by Ben Salinger, Sr.

Affiant further states that Mr. Knewell told him that he was informed by another attorney in the City of Sioux Falls that he would be liable for costs in the event that the suit should be decided in favor of Mr. Egan.

J. D. COON.

Subscribed and sworn to before me this 24th day of January, 1925.

[SEAL.]

E. L. CAILLE,
Notary Public Minnehaha County,
South Dakota.

II. Affidavit of Hugh S. Gamble.

Hugh S. Gamble, being duly sworn, deposes and says, that he was the State's Attorney of Minnehaha County, South Dakota, from the 2d day of January, 1923, until the 6th day of January, 1925; that deponent received a telegram from Vincent L. Knewell, who was at that time Sheriff of Minnehaha County, South Dakota, from the City of Minneapolis, and State of Minnesota, where he was in company with the Appellee before the Hon. Wilbur F. Booth, Judge of the District Court of Minnesota, acting for and instead of the Hon. James D. Elliot, Judge of the District Court for the District of South Dakota; that he, deponent, did not appear in said action, except for a request for a continuance in the matter of making Sheriff's Return and that all appearances of counsel for Appellee were made by the Hon. Buell F. Jones, Attorney General of the State of South Dakota, and that deponent acted only in said matter as State's Attorney of Minnehaha County, South Dakota.

(Signed) HUGH S. GAMBLE.

Subscribed and sworn to before me this 4th day of April, 1925.

GEORGE E. JOHNSTON,
Notary Public, South Dakota.

III. Consent of George Boardman as Sheriff to be Substituted as Appellant.

The undersigned, George Boardman, being the duly elected, qualified and acting Sheriff of Minnehaha County, South Dakota, hereby states to the Court that he assumed such office on January 6, 1925, and has at all times since such date been the incumbent of said office. That he hereby consents to be substituted in the place of his predecessor, Vincent L. Knewell, as Appellant, and as a party to the above entitled action, hereby ratifies and approves all that counsel for Appellant has heretofore done with respect to securing his substitution for the said Knewell as a party to said action.

Dated March 20th, 1925.

GEORGE BOARDMAN.

STATE OF SOUTH DAKOTA,
County of Minnehaha, ss:

George Boardman, being first duly sworn, upon oath states that he is the person who signed the within and foregoing paper, and that he knows the contents thereof, and the same is in all respects true.

GEORGE BOARDMAN.

Subscribed and sworn to before me this 20th day of March, 1925.

[SEAL.] J. D. COON,
Notary Public, S. Dak.

IV. Statement in Opposition to Motion to Dismiss.

For our position with reference to motion to dismiss, see our argument and authorities in the main brief under the heading of discussion of Motions to Substitute and to Intervene. We there contended that the only necessary party before the Court in a *habeas corpus* matter is the petitioner, the legality of whose detention is involved; that it is not a suit between him and the officer who happens to have him in charge; that when the writ issues, the Court becomes responsible for the custody of the petitioner and must dispose of him as law and justice require. We further showed that the appeal was regularly taken to this Court, and this Court now has full jurisdiction of the cause for all purposes; that under the law the duty has now devolved upon this Court to dispose of the party as law and justice require.

We call to the attention of the Court that the writ of *habeas corpus* was directed to the officer Knewell in his official capacity as Sheriff of Minnehaha County, South Dakota; that he made return to the writ as such officer, and took his appeal to this Court as such officer. The Attorney General and State's Attorney of Minnehaha County appeared for him in such official capacity in the District Court, and appear for him here as such official. This is their right and duty under the law. See Sec. 5364, South Dakota Revised Code, Main Brief, page 67. They did not assume to represent him in his private or individual capacity either in the district court or here. So far as he is involved here as an official of the State is concerned, they claim the right to represent him, protect the State's interest, and control this litigation to that end. *State ex rel. v. Huegin,* 110 Wis., 189.

We are here offering to fully relieve Knewell as an individual from any burden or liability, by furnishing new appeal bond or indemnity. This the Court may properly grant. *Jerome v. McCarter,* 21 Wall., 31; *Brown v. McConnell,* 124 U. S., 492; *Draper v. Davis,* 102 U. S., 370. We are further offering to have the State of South Dakota, which is the real party in interest, and the official who has succeeded Knewell, step in and fully assume the burden and the liabilities of this litigation. Knewell is no longer in office, and should not assume to control this litigation. Permit him to be fully relieved and protected, and go hence. And all this is proposed and done that this Court may properly pursue the inquiry enjoined upon it by law, and dispose of the party before it as law and justice require.

Respectfully submitted,

BUELL F. JONES,
Attorney General of South Dakota.
BYRON S. PAYNE,
SAMUEL HERRICK,
Attorneys for Appellant, State of South Dakota, and for George Boardman as Sheriff of Minnehaha County, S. Dak.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924.

No. 622.

VINCENT L. KNEWEL, AS SHERIFF OF MINNEHAHA COUNTY, SOUTH DAKOTA, APPELLANT,

vs.

GEORGE W. EGAN.

MOTION BY APPELLANT TO DISMISS APPEAL AND TO STRIKE APPELLANT'S BRIEF.

JOE KIRBY,
Counsel for Appellant.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1924.

CASE No. 622.

VINCENT L. KNEWEL, APPELLANT,

vs.

GEO. W. EGAN, APPELLEE.

Motion by Appellant, Vincent L. Knewel.

Comes now Vincent L. Knewel and by his attorneys respectfully moves this Court:

1. To strike from the record the purported brief and argument filed on his behalf in this Court by B. S. Payne and B. F. Jones, and others, purporting to represent him in this case, for the reason that he never authorized the preparation or the presentation of any brief in this proceeding; that he never authorized any attorneys to appear in this Court for him as appellant.

2. To dismiss this appeal in accordance with his original motion, which he served on appellee December 15, 1924, and sent with a personal letter to the Clerk of this Court on December 31, 1924. Reference had to appellant's affidavit attached hereto and made a part hereof.

JOE KIRBY,
Attorney for Appellant.

IN THE

SUPREME COURT OF THE UNITED STATES.

CASE No. 622.

VINCENT L. KNEWEL, *Appellant,*

vs.

GEO. W. EGAN, *Appellee.*

Affidavit of Vincent L. Knewel.

STATE OF SOUTH DAKOTA,
County of Minnehaha, ss:

Vincent L. Knewel, first being duly sworn, states that he is the appellant in the case entitled in this Court Vincent L. Knewel, appellant, *vs.* Geo. W. Egan, appellee; that he never authorized any attorneys to prepare or file any brief for him; that he never authorized either B. S. Payne, attorney, or B. F. Jones, or any other of the attorneys who up to this time claim to appear for him in this Court; that this appellant desires to have this case dismissed and has acted accordingly, and does not feel that he is further bound for any action in connection herewith.

VINCENT L. KNEWEL,
Affiant.

Subscribed and sworn to before me this 8th day of April, 1925.

[SEAL.] JOE KIRBY,
Notary Public.

Endorsed: File No. 30,587. Supreme Court U. S. October Term, 1924. Term No. 622. Vincent L. Knewel, as Sheriff, etc., Appellant, vs. George W. Egan. Motion by Appellant to Dismiss Appeal and to Strike Appellant's Brief. Filed April 13, 1925.

(6135)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1924.

No. 622

VINCENT L. KNEWEL,
as Sheriff of Minnehaha County, South Dakota,
APPELLANT,

vs.

GEORGE W. EGAN,
APPELLEE.

APPEAL FROM ORDER AND JUDGMENT OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH DAKOTA, SITTING IN THE SOUTHERN DIVISION OF SAID DISTRICT.

HON. ALBERT L. REEVES, Presiding.

IN THIS BOOKLET APPELLEE PRESENTS:—

I. HIS MOTION TO DISMISS APPEAL.
II. HIS OPPOSITION TO THE MOTION TO INTERVENE.
III. HIS OPPOSITION TO THE MOTION TO SUBSTITUTE.
IV. HIS BRIEF ON THE MERITS OF THE MAIN CASE.
V. THE OPINION AND JUDGMENT OF TRIAL COURT.

GEO. W. EGAN, Appellee, Pro Se Se.

Press of Mark D. Scott, Sioux Falls, S. D.

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TABLE OF CASES CITED (Continued)

STATEMENT.

Appellee has sought to follow strictly the rules of this Court in the preparation and presentation of his Brief and Arguments.

1. Perhaps it might be urged that there should have been a division of the subject matter contained in this booklet and that the Motion of Appellee and his Opposition to the *Motion to Intervene* and the *Motion to Substitute* should have appeared in a separately printed document.

2. It has occurred, however, to Appellee that by condensing and compiling these matters into this one booklet it would be much to the convenience of Court and counsel.

3. Appellee desires to have first considered by the Court the Motion of Vincent L. Knewel to dismiss this case; which Motion was served on Appellee on the 15th day of December, 1924, and lodged with the Clerk of this Court for filing on December 31st, 1924.

4. It appears that this Court's attention was never called by its Clerk to this Motion of Appellant Knewel. Therefore, to bring Knewel's Motion before the Court, Appellee has addressed his Motion to this Court, hoping to accomplish that end.

5. Following Appellee's Motion just referred to are his reasons for opposing the *Motion to Intervene* and the *Motion to Substitute*, with his citation of authorities on these questions; the affidavit of Vincent L. Knewel is set forth showing some facts relied on.

6. Then follows in regular order the statement of the original case that was tried before Judge Albert L. Reeves, of Kansas City, in the United States District Court, and the brief and argument supporting Appellee's contention that if the case is not dismissed by this Court on the Appellant's Motion that the decision of Judge Albert L. Reeves in the District Court of the United States should be by this Court affirmed, and this appeal dismissed.

Rsepectfully submitted,

GEO. W. EGAN, *Pro Se Se.*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1924.

No. 622

VINCENT L. KNEWEL,
As Sheriff of Minnehaha County, South Dakota,
Appellant,

vs.

GEORGE W. EGAN,
Appellee.

APPEAL MUST BE DISMISSED.

The Court will not have proceeded far in the consideration of the case at bar before it shall realize that this appeal must be dismissed.

Knewel was the only appellant. Knewel quit. He paid the cost taxed against him in the United States District Court and on December 15th, 1924, prepared, served and forwarded to the Clerk of this Court his written Motion asking that this case be dismissed.

Those opposing the appellee recognize that Knewel is through, that he will proceed no further and that he cannot be compelled to assume any further responsibility in connection with this appeal in the present condition of the Record, and that his personal bond cannot be held further.

Therefore, they seek to substitute a new party for Knewel and they also ask that the State of South Dakota be permitted to intervene. This cannot be granted.

Collins v. Miller, 252 U. S. 364 l. c. 368.

State v. Kelsey, 231 Pac. 122.

Baird, Sheriff v. Nagel, 142 N. E. 9 l. c. 11.

Therefore appellee presents first in this booklet his

Motion to bring on before the Court, Knewel's Motion to Dismiss.

Appellee next calls the Court's attention to his Opposition to the purported Motions to Intervene and to Substitute.

NO BRIEF SERVED.

Up to the time of the writing of this brief, March 30th, 1925, those opposing appellee have served no brief or argument and it is necessary for the writer to anticipate rather than to answer definitely and specifically.

Not having received a copy of the brief and argument of those opposing appellee he cannot say what kind of a statement they have made. Therefore, appellee deems it necessary to make a definite and specific statement of the issues in the main case from the record for the convenience of the Court.

I. HIS MOTION TO DISMISS APPEAL.

Comes now GEO. W. EGAN, Appellee in this Court, and respectfully moves:

1. That this Court make an order requiring Clerk of the Court to call to this Court's attention a Motion to Dismiss made by Appellant VINCENT L. KNEWEL, and served upon Appellee GEO. W. EGAN, on December 15th, 1924, and lodged with the Clerk of this Court for filing on the 31st day of December, 1924, which Motion to Dismiss Appeal is in words and figures as follows, to-wit:

OMITTING CAPTION:

"Comes now the respondent herein (appellant in this Court) and shows unto this Court that the said District Court, sitting as aforesaid, did on the first day of April, 1924, make and cause to be entered in the above entitled case, its judgment and order sustaining the petition in habeas corpus filed by said George W. Egan, the petitioner and plaintiff (now appellee), in the above entitled case.

"Appellant shows further that on the 12th day of May, 1924, he duly perfected an appeal to this Court, and in connection therewith made and delivered his bond condi-

tioned to pay all costs that might be adjudged herein, or on this appeal.

"This appellant being unwilling to bear further the burden of this appeal, and desiring to be relieved from the payment of costs made later than this date, and for which judgment in this appeal might be entered herein, now respectfully moves this Court that his said appeal in the above entitled cause be by this Court dismissed."

VINCENT L. KNEWEL,
Sheriff of Minnehaha County,
South Dakota,
(*Now Appellant*)

"I, George W. Egan, Petitioner and Plaintiff, (now Appellee, hereby admit that service of the above and foregoing Motion was duly and properly made upon me the 15th day of December, 1924."

GEO. W. EGAN,
(*Now Appellee*)

For the following good and sufficient reasons, to-wit:

(a) Vincent L. Knewel was and is the only person entitled to appeal in behalf of the appellant in this case.

(b) It is a well settled rule of law that only the party or parties to the suit may appeal from final judgment; a third party cannot take an appeal in the name of a party to the decision merely because it may affect his interests adversely. *Baird, sheriff v. Nagel* 142 N. E. Page 9.

(c) This Court settled for once and for all that no other person than the party against whom the writ runs may appeal from an adverse decision in a habeas corpus proceeding. This was definitely decided in *Collins v. Miller* 252 U. S. 364 at Page 368, concluding paragraph.

2. It being the settled law that in the case at bar Knewel alone may appeal it must follow, as the night the day, that Knewel alone controls the destiny of the case from the viewpoint of the appellant. He, only, having the right to appeal, he, alone, has the right to have this case dismissed on his Motion. Having prepared and served his Motion to Dismiss this case he is entitled to have an order of this Court based on said Motion of Dismissal.

3. That the attorneys claiming to represent Appellant

Knewel do not represent him, never were instructed to appeal and were at no time appearing for Appellant Knewel in this appeal with his knowledge or consent (see affidavit of Knewel made part of this Motion and herein set out); that each party to a suit has a right to select his own attorney and no attorney may appear for him or act for him without his knowledge or consent. See *Baird, Sheriff v. Nagel,* 142 N. E. Page 9, at Page 11.

Wherefore, Appellee prays that his Motion be sustained, and that this appeal be dismissed.

State of South Dakota, County of Minnehaha, ss.

AFFIDAVIT OF VINCENT L. KNEWEL

VINCENT L. KNEWEL, first being duly and solemnly sworn on his oath, states: That he is the same Vincent L. Knewel who appears as appellant in KNEWEL VS. EGAN now pending in the Supreme Court of the United States; that when the writ in the habeas corpus was served on him on December 1st, 1924, that on the 3rd of December following he communicated with Hugh S. Gamble, States Attorney of Minnehaha County, and asked Mr. Gamble to represent him in the habeas corpus hearing; that he never at any time employed or engaged any other attorney than said Hugh S. Gamble; that B. L. Jones and B. S. Payne, of the Attorney-General's office came into the case without affiant's knowledge or consent; that they took charge of the case for affiant without any request on affiant's part and practically crowded affiant's attorney out of the case; that affiant did not want to appeal this case after he had read the opinion of Judge Albert L. Reeves of Kansas City. The opinion seemed right to affiant, but B. F. Jones and B. S. Payne told affiant that they were going to appeal and could appeal without him, and because of that they induced appellant to appeal the case; that later affiant took counsel with the most competent lawyers he could get and was advised by them that Judge Reeves had stated the law. Affiant then thought that any appeal would only be to harass and persecute Egan and he did not want to be a party to any such proceeding because he knew that B. F. Jones and B. S. Payne were personally unfriendly to Egan. That as soon as affiant received a statement from the Clerk of the United

States Court as to the amount of costs due to Egan as a result of the trial before Judge Reeves affiant paid the costs to Egan. Affiant had his attorneys prepare a motion for him to dismiss this case in the United States Court. He served the motion on Egan and then sent the motion with a personal letter to the Clerk of the United States Court at Washington, asking him to file the same and call the Court's attention to the motion. Affiant still wants this case dismissed. There are no lawyers appearing for appellant in the Supreme Court with his consent or at his request. Affiant has learned by hearsay that B. F. Jones and B. S. Payne, or somebody acting for them, have filed a motion to substitute George Boardman as appellant instead of this affiant. Affiant has received no notice of any such motion and knows nothing about it, is not a party to it and does not authorize it. Affiant has also learned by hearsay that the same parties have filed a motion for the State of South Dakota to intervene in this case, but affiant has received no notice of any such proceeding and knows nothing about it, does not consent to it and specifically objects and opposes the substitution of George Boardman or the intervention of the State of South Dakota, and requests that this case be dismissed on his motion.

VINCENT L. KNEWEL.

Subscribed and sworn to before me this 10th day of March, 1925.

(SEAL) N. O. MONSERUD,
Notary Public.

II. HIS OPPOSITION TO MOTION TO INTERVENE.

George W. Egan, Appellee herein, opposes the Motion to Intervene by the State of South Dakota filed in this case on January 23rd, 1925, for the following good and sufficient reasons:

1. It is a well settled rule of law that no party may intervene in a suit or case after final judgment. This case was tried in the United States Court before Judge Albert L. Reeves, as a case entitled, Egan, Petitioner, vs. Knewel, Respondent. No other parties were known to the case at the time of its trial.

2. The record shows that Knewel was the only Appellant in this case; that the attorneys who claim to represent Boardman and the State of South Dakota in the Motions in this case appeared for Knewel before the Trial Court and signed themselves as his attorneys, see Record p. 109, 117, 120; that said attorneys made no effort to intervene in behalf of the state of South Dakota or to suggest any substitution in the trial of this case; that on appeal being taken by Appellant Knewel he furnished his personal bond conditioned on the payment of $1000.00; that no new bond can be given; that Knewel alone can be held for costs; that no new bond can legally be substituted; that this is a civil suit and that the County or State cannot be held for costs. See *Faulke v. Board* 48 Pacific Reporter Page 153—"If it was a civil case of course the costs are not payable by the County." *The Commissioners v. Wilson* 34 Pacific Reporter 625; *Boykin v. People* 46 Pacific Reporter 635.

3. To permit the State of South Dakota, or any other person, to intervene in this case in this Court would be to change entirely the nature of the proceedings and the case would stand not as between Knewel and Egan, or Egan and Knewel, but between Egan and Knewel and the State of South Dakota, or whomever might be permitted to intervene as a party. Appellee is entitled to have this case heard by this Court in the same form or manner as it was heard in the Trial Court. This is a matter of justice not only to Appellee Egan but the Trial Court. The Trial Court was the one, if anyone, to pass on the right of any intervention in this case.

4. The State of South Dakota *did not ask to intervene* in this case at its trial and *was not* represented. Proof conclusive of that fact is that they *are here now* trying to intervene. To allow the State of South Dakota to intervene would be to say that the State of South Dakota *had a right to appeal* in this particular case between these particular parties. Such would be a direct contravention of the law as laid down by this Court and many inferior Courts in the land. *Collins v. Miller,* 252 U. S. Page 364 at Page 368; *Baird, Sheriff v. Nagel,* 142 N. E. page 9; *Faulke v. Board,* 48 Pacific Reporter page 153; *Commissioners v. Wilson,* 34 Pacific Reporter page 265; *Boykin v. People,* 46 Pacific Reporter page 635.

"There is no authority for an appeal by persons not parties to the judgment or decree. The state, like an individual person, has the right to appeal from a judgment in a civil action, but it cannot appeal when it is not a party. *Georgia v. Jesup,* 106 U. S. 458, 1 S. Ct. 363, 27 L. Ed. 216; *South Carolina v. Wesley,* 155 U. S. 542, 15 S. Ct. 230, 39 L. Ed. 254; *Fry v. Britton,* 2 Heisk. (49 Tenn.) 606. Habeas corpus proceedings are civil and not criminal, and belong to what, under the Code, are termed "special proceedings". In such proceedings the applicant is the plaintiff, and the party who restrains the applicant is defendant. *Winnovich v. Emery,* 33 Utah, 344, 93 P. 988."

5. That the attorneys claiming to represent Appellant in this Court do not represent him, and are acting without authority. See affidavit of Appellant Knewel herein; that the attorneys claiming to represent the proposed Intervenor and the proposed Substituted party claim also to represent Appellant; while in truth and in fact these attorneys do not represent Appellant Knewel, or George Boardman, and have not been employed by either of them, nor have they been instructed to proceed in this case, *nor has any notice* of the proposed Intervention been *served* either on Knewel or Boardman, *or any person for them.* Each party in Court has a right to be represented by attorneys of his own choosing. *Baird, Sheriff v. Nagel* 142 N. E. Page 9 at Page 11. See *State v. Kelsey,* Pacific Reporter 241-122.

Therefore, Appellee prays that the Motion to Intervene in behalf of the State of South Dakota may be denied.

III. HIS OPPOSITION TO MOTION TO SUBSTITUTE.

George W. Egan, Appellee herein, opposes the Motion to Substitute George Boardman for the present Appellant, Vincent L. Knewel, filed in this case on January 14, 1925, for the following good and sufficient reasons, and for the reasons stated in opposition to the Motion to Intervene:

1. The attorneys claiming to represent Appellant Vincent L. Knewel *are not* authorized now, to appear for him, nor are they now, nor were they ever, authorized to appear for George Boardman, by him or any other person; that their appearance in this case so far as the real parties to

it are concerned is purely gratuitous and without authority. *Baird vs. Nagel,* 142 N. E., page 9, at page 11.

2. That no notice of the proposed Substitution has ever been served on Vincent L. Knewel, real appellant, or George Boardman referred to. (See affidavit of Vincent L. Knewel supporting this position.)

3. Section 2317 of the Revised Statute of the State of South Dakota referred to in the Motion to Substitute has no application herein because the Appellant is not in any wise disqualified but is in as good position to prosecute this case as he ever was if he desired to do so.

4. This case in truth and in fact does not exist so far as Appellant Knewel is concerned, for he has made and served on Appellee and lodged with the Clerk of this Court his written declaration in the form of a Motion requesting that the case be dismissed and declaring that he will not further prosecute it. (See affidavit of Vincent L. Knewel in support hereof.) *State vs. Kelsey,* Advance Sheets Pacific Reporter, Jan. 19th, 1925.

5. Because a third party cannot appeal in the name of a party to a decision merely because it affects his interests adversely, or because he may have succeeded to the position of another who has or can appeal.

6. Because "A third party cannot take an appeal in the name of a party to the decision merely because it may affect his interests adversely. *Colman v. West Va. Oil Co.,* 25 W. Va. 148; *McIntyre v. Sholty,* 139 Ill. 178, 29 N. E. 43; *Board v. Wild,* 37 Ind. App. 32, 76 N. E. 256; 142 N. E. Page 9.

In *State ex rel v. Huegin,* 110 Wis. 189, 85 N. W. 1046, 62 L. R. A. 700, the court, in discussing the rights of the state and of the sheriff, under a proceeding like the one in the instant case, said:

"Upon the district attorney was imposed the duty of guarding the interest of the state, but he had no duty to perform by virtue of his office for the sheriff as an individual. The latter was a party, and an interested party, because he was charged with being guilty of the particular wrong which it was the purpose of the writ to redress; hence the law must be

construed as according to him the same right as to any other party to be heard by counsel."

7. There is no law applicable to the case at bar permitting substitution and the congress recognizing this fact passed an act Amending Judicial Code, which act was approved February 13th, 1925. Public Number 415-68th Congress, H. R. 8206.

Therefore, Appellee prays that the Motion to Substitute George Boardman for the present Appellant Vincent L. Knewel may be denied.

STATEMENT OF FACTS ON MAIN CASE.

1. Defendant Egan was informed against in the Circuit Court of Minnehaha County, South Dakota, under Section 4271 of the Revised Code of 1919 of that State, which Section is in part as follows:

> "Every person who presents or causes to be presented any false or fraudulent claim, or any proof in support of any such claim, upon any contract of insurance for the payment of any loss . . . is punishable by imprisonment in the state penitentiary, not exceeding three years, or by a fine not exceeding $1000, or both."

2. The charge sought to be lodged against Egan was stated in the following language in the *Information*:

> "And that thereafter, and on or about the 9th day of January, 1920, the said defendant, George W. Egan, then and there did wilfully, unlawfully, and feloniously present and cause to be presented to F. C. Whitehouse & Company, who were at that time acting as the agents for the Firemen's Insurance Company of Newark, New Jersey, a false and fraudulent claim and proof in support of such claim."

3. Egan in due course appeared in Court and entered his plea of *Not Guilty*.

4. A judge from a distant judicial circuit was called in to sit in the case. When the case was called for trial on the 3rd day of April, 1922, defendant Egan appeared in person acting as his own attorney, and made a Motion

to the Court for permission to *withdraw* his plea of *not guilty* for the purpose of interposing a *demurrer*. This Motion was denied by the Court and the case was ordered to trial. Record before this Court page 5.

5. Then before any evidence was offered or received defendant again appealed to the Court for permission to *withdraw* his plea of *not guilty* for the purpose of interposing a *demurrer*. This again was denied. See Record page 5.

6. And then defendant interposed the following specific objection of record—"Defendant objects to the introduction of any testimony under the *information* filed in this case, because,"—he then proceeded to state five specific grounds for his objection, the third and fifth of which are as follows:

> "3rd,—That said *information* does not describe a public offense, that *no venue* is laid and that the Court is without jurisdiction in this case under the *information* filed herein.
>
> "5th,—That the *County* in which the alleged offense is alleged to have been committed is not stated in said *information*, and that said information is defective in failing to *lay the venue* in order to give the Court *jurisdiction in the premises.*"

7. The Trial Court promptly overruled defendant's objection and the trial was proceeded with.

8. At the conclusion of all the testimony on the part of the state, defendant moved for an *advised verdict* setting forth in the record specifically all the grounds mentioned, and which grounds are set forth fully in the record before this Court at Page 6. This Motion was denied.

9. At the conclusion of all the testimony, both on the part of the state and of the defendant, defendant again renewed his Motion for an *advised verdict* on all the grounds heretofore referred to, which Motion was denied.

10. Then defendant urged all these grounds in his motion in *Arrest of Judgment*, which Motion was denied.

11. Defendant then moved for a new trial, setting forth all the grounds heretofore mentioned. This Motion was denied.

12. Case went to the Supreme Court of South Dakota. Defendant urged all of his grounds before that Court, and particularly that the Trial Court was *wholly without jurisdiction*, stating specifically why. There defendant was overruled and *denied a new trial.* Defendant Egan then made a Motion for a *re-hearing,* setting forth all grounds. That, too, was denied.

13. A Mittimus was issued out of the office of the Clerk of the Circuit Court of Minnehaha County based on the judgment returned on the *information and facts as herein set out,* and defendant Egan then surrendered to the Sheriff of Minnehaha County, Vincent L. Knewel, Appellant in this Court.

14. Then defendant Egan immediately presented a Petition for a Writ of Habeas Corpus in the United States Court and secured from Judge Wilbur F. Booth, in Minneapolis, a Writ.

15. Thereafter, Judge Walter H. Sanborn, of St. Paul, assigned Judge Albert L. Reeves, of Kansas City, to hear petitioner's petition and the return thereon. At the hearing on the merits of Egan's Petition, B. F. Jones, of Pierre, South Dakota, Attorney-General, and B. S. Payne, Ex-Attorney-General, appeared and signed themselves as attorneys for Vincent L. Knewel, then respondent.

16. After a full and complete hearing Judge Albert L. Reeves rendered his decision and order on April 1st, 1924, liberating Petitioner Egan and exonerating his bond. Record page 104.

17. Thereafter and on the 12th day of May, 1924, Vincent L. Knewel, Respondent below, Appellant in this Court, perfected his appeal from the judgment and order of the District Court of the United States for the District of South Dakota, to the Supreme Court of the United States, where it now pends for disposition.

18. On December 15th, 1924, Vincent L. Knewel, Appellant, prepared and served on George W. Egan, Appellee, his Motion to dismiss the case in the United States Supreme Court.

19. Appellant, Vincent L. Knewel, then forwarded his Motion, with the acceptance of service by Egan on the same, with a personal letter to the Clerk of the Supreme

Court of the United States. Affidavit of Knewel, Appellant, at 4th page hereof.

20. Thereafter, and on the 14th day of January, 1925, there was filed with the Clerk of this Court, a purported Motion by the same attorneys who had appeared for Knewel at the hearing before Judge Reeves, asking that George Boardman be substituted for Vincent L. Knewel as Appellant.

21. Thereafter, and on the 23rd day of January, 1925, there was filed with the Clerk of this Court, by the same attorneys who had appeared for Knewel at the hearing before Judge Reeves, a purported Motion to Intervene by the State of South Dakota.

22. This is a complete statement of the case up to the present time as it appears in the record before this Court.

IV. HIS BRIEF ON THE MERITS OF THE CASE.

Appellee renews and specifically urges before this Court all the grounds supporting his contention for his release as set forth in his Petition for Writ of Habeas Corpus and his Amended Petition, both of which appear in full beginning on Page 1 and ending at the top of Page 16 of the printed Record before this Court.

The United States District Court did not pass on all these questions because it stated:

1. The Courts of South Dakota were *without jurisdiction* because no offense was charged in the Information against the petitioner.

2. The Courts of South Dakota were *without jurisdiction* because the complete record showed that no offense had been proven against the petitioner.

The Trial Court, having made definite and specific findings of a *lack of jurisdiction*, held that it was unnecessary to investigate and pass on any other question. This proposition is *incontrovertible*. If the Courts of South Dakota that rendered the judgment and ordered the commitment of the appellee, *were without jurisdiction* then the whole proceeding and all proceedings were a *pure nullity, Ab Initio*.

The Information filed in this case under which defen-

dant was forced to trial over his strenuous and proper objections shows on its face clearly the *lack of jurisdiction* of the Trial Court. Not only does this Information fail to charge any offense *within the jurisdiction of the Court* but a fair reading of the Information and the only reasonable interpretation of it is that if the offense sought to be charged in the Information under Section 4271 was committed at all it was committed at *Newark, New Jersey.*

The proof that no offense was established at the trial against the defendant, Egan, is shown conclusively by an examination of the record. The record discloses a total failure to prove any offense under Section 4271 because there was no evidence that any alleged false proof of loss was presented to the insurance company or its agent in Minnehaha County, South Dakota.

Those opposing the appellee here, at the trial in the United States District Court admitted that the Information did not charge an offense but stated that defendant Egan had waived his rights to insist upon the *failure of jurisdiction.*

The Trial Court held definitely against them and made a finding that instead of waiving anything the defendant Egan had in a most strenuous and proper manner objected and protested his rights. It will not be seriously contended, however, that one can waive jurisdiction. It is hornbook law that the question of jurisdiction might be raised for the first time in this, the highest Court of the land. Jurisdiction in criminal cases is established by law *and not by consent of parties.* This also, is elementary and cannot be successfully controverted.

LETTER NOT PRESENTED.

Those opposing appellee sought in the Trial Court, and doubtless will urge here, that they had a letter which purported to have been written by Egan to the insurance company. This letter was altogether incompetent for specific reasons urged against it at the time it was offered in the evidence. There isn't a word of testimony in the Record that this letter was written by Egan or was ever mailed or delivered by him or anybody for him, or by anybody as a matter of fact, to the insurance company or any of its agents. Officers and agents for the insurance company were on the stand at the trial and none of them

testified that they had received the same through the mail from Egan or from anybody else. The United States District Court, after going through the record, stated definitely that no offense had been proven against defendant Egan. Letter purports to have been dated Jan. 10th, 1920.

Article 6, Section 7, of the Constitution of the State of South Dakota, is as follows:

> "In all criminal prosecutions the accused shall have the right to defend in person and by counsel; *to demand the nature and cause of the accusation against him;* to have a copy thereof; to meet the witnesses against him face to face; to have compulsory process served for obtaining witnesses in his behalf, and to a speedy public trial by an impartial jury of the county or DISTRICT in which the offense is ALLEGED to have been committed."

To "allege" means, to bring forward with positiveness; to declare; to affirm; to assert; to adduce; to advance; to assign; to produce—Webster's International Dictionary.

The Supreme Court of South Dakota in effect holds that the word "district" as used in this Section of the State Constitution means "county"—In Re: Nelson 102 N. W. 885, it is said: "Const. Art. 6 Sec. 7. This clause, or language of similar import, will be found in numerous state Constitutions. Sir William Blackstone says: 'When, therefore, a prisoner on his arraignment has pleaded not guilty, and for his trial hath put himself upon the country, which country the jury are, the sheriff of the *county* must return a panel of jurors * * * freeholders, without just exception, and of the *visne* or neighborhood, which is interpreted to be of the *county* where the act is committed.' 2 Cooley, Blackstone (3d Ed.) 491. The right thus guaranteed is ancient, sacred, and absolute. In its alleged infringement was declared to be one of the causes which impelled the colonies to separate from the mother country. It can neither be taken away nor abridged by the Legislature. What, then, is the nature and extent of this right; To what is one accused of crime entitled? 'A speedy public trial by an impartial jury of the *county* or *district* in which the offense is *alleged to have been committed.*' There is nothing uncertain or ambiguous in this language,

except, perhaps, the use of the word *'district'*, which has uniformly been construed to mean *the trial district, or territory from which the jury is summoned."*

This Section of the South Dakota State Constitution was construed: "All persons, when charged with crime, of whatever nature, are equally entitled to the protection of the constitution, and to invoke the safe guards those provisions have guaranteed to them for their protection. *Our conclusions are that the indictment is not sufficient and that the objections of the plaintiff in error to the admission of any evidence under it ought to have been sustained, and that the motion in arrest of judgment should have been granted. The judgment of the Circuit Court is reversed, and the Court is directed to set aside the indictment."—State vs. Burchard* 57 N. W. 491 at Page 492.

Appellee was convicted under Section 4271 of the Revised Code of South Dakota, which in part is as follows: "Every person who *presents* or causes *to be presented* any false or fraudulent claim, or any proof in support of any such claim, upon any contract of insurance for the payment of any loss . . . is punishable by imprisonment in the state penitentiary, not exceeding three years, or by a fine not exceeding $1000. or both."

Section 4725 of the Revised Code of 1919 provides: "The indictment or information is sufficient if it can be understood therefrom." Six sub-sections are contained in this Section and Sub-section 4 is as follows: "That the offense charged was committed WITHIN the jurisdiction of the Court or though WITHOUT the jurisdiction of the Court it is triable therein."

By Section 4779 South Dakota Revised Code 1919, it is provided that objections, under said Section 4771, can only be taken by demurrer *"except that the objection to the jurisdiction of the court over the subject of the indictment or information, or that it does not describe a public offense may be taken at the trial under the plea of not guilty and in arrest of judgment."*

Section 4509 of the Code of South Dakota provides as follows: "When a public offense is committed partly in one county and partly in another county or the acts and effects thereof requisite to the offense occur in two or more counties the *jurisdiction is in either county."*

Section 4510 of the Code of South Dakota provides as follows: "When a public offense is committed on the boundary of two or more counties or within five hundred yards thereof *the jurisdiction is in either county.*"

Thus it will readily appear that not only is the accused protected in his rights to be tried by a Court having competent jurisdiction with the venue clearly *alleged* and "*proven as laid in the information*", by Article 6 of Section 7 of the organic law of the state but the Legislature enacted special statutes, herein set out, making his guarantees doubly sure and the certainty of his rights doubly certain.

The only allegation in the information as to County or District or Venue is as follows:

> "And that thereafter, and on or about the 9th day of January, 1920, the said defendant, George W. Egan, then and there did wilfully, unlawfully, and feloniously present and cause to be presented to F. C. Whitehouse & Company, who were at that time acting as the agents for the Firemen's Insurance Company of Newark, New Jersey, a false and fraudulent claim and proof in support of such claim."

Thus it has already appeared both by a positive provision of the State Constitution and under Sub-section 4 of Section 4725 of the Revised Code of 1919 that the VENUE MUST BE ALLEGED—"In the information or indictment in order to give the Court JURISDICTION of the alleged offense the law is well settled that it is absolutely necessary that the VENUE MUST BE ALLEGED in the information and that it cannot be INFERRED." Section 7 Article 6 State Constitution; Section 4725 Subsection 4 Code of 1919; *State vs. Williams* 4 Ind. 234; *Freeman vs. State* 224 S. W. 1087; *U. S. vs. Christopherson* 261 Fed. 225; *State vs. Cole, et al,* 174 Pac. 131; *People vs. Webber* 66 Pac. 38; *State vs. Mahoney* 98 Atl. 750; *State vs. Parks* 44 Cal. 105; *Howard vs. Supreme Court* 153 Pac. 7; *State vs. Beeskove* 85 Pac. 371; *State vs. McCoy* 35 N. W. 202; *Gaweka vs. State* 142 N. W. 287; *People vs. Craig* 59 Ca. 370; *People vs. Wong Wang* 28 Pac. 721; *Territory vs. Doe* 25 Pac. 472; *State vs. Knight* 43 N. E. 995; *The People ex rel Fleming Stevenson; Plaintiff in error vs. James M. Higgins, defendant,* 15 Ill. 110; *People vs. Wakao et al,* 165 Pac. 721; *Ex Parte Slater* 72 Mo. 102.

It is hornbook law and there can be found no decision to the contrary that *the venue must be proven as alleged in the information. Wall vs. State* 63 S. E. 27; *In re: Kelly* 46 Fed. 653; *State vs. Sexton* 124 S. W. 521; *State vs. Schneiders* 168 S. W. 604; *State vs. Wheaton* 99 Pac. 1133; *People vs. Blummenberg* 110 N. E. 790; *People vs. Parks* 44 Cal. 105; *Ex parte Slater* 72 Mo. 102.

State vs. Wheaton 99 Pac. 1133—"Where a person is charged with having committed the offense above referred to in a particular County and is convicted thereof in the District Court of such County but no evidence is produced to establish where the crime was committed the conviction cannot stand."

In *People vs. Blummenberg* 110 N. E. 790 the Court holds: "It is further contended that the venue in Will County was not proven and this contention must be sustained. There is no claim that the defendants in the indictment actually entered into any conspiracy in Will County and the VENUE IN THAT COUNTY depends upon the proof of the commission of an overt act." In *People vs. Fisher* 51 Cal. 320 the Court holds: "The point is made that it is not proven that the alleged offense was committed in the County of San Joaquin. Upon a careful examination of the Bill of Exceptions we find no evidence to PROVE THE VENUE. Case reversed." Hundreds of cases might be cited to the Court holding this to be the general rule of law practically without exception.

The writer will close his citation of authorities on the question of the necessity *of laying the venue and proving it as laid* by citing a case which his opponents will not question. The case we have in mind is one decided by the Supreme Court of the State of South Dakota. *State v. Crowley* 108 N. W. 491, where it is said: "*That the venue is a matter of fact which must be proved as laid in the indictment or information, is too elementary to justify the citation of supporting authorities.*"

Let the allegation in the information which is before the Court and the whole record be measured by these accepted principles of law and we are certain that the United States District Court will be fully affirmed in its statement when it said:

"It follows from the foregoing that the information challenged in the State Court and here, stands condemned by statute and is insufficient. Being insufficient it cannot sustain a judgment and all proceedings tending thereto are void . . . there is *no evidence* that the alleged offense was committed any place *within the jurisdiction* of the Trial Court and such failure of proof could have been adjudged sufficient to oust the State Court of jurisdiction, even if the information had contained proper jurisdictional averments."

The Court will keep in mind that the only charge in the Information in connection with the presentation of the "Proof of Loss" is that Appellee "did wilfully, unlawfully, and feloniously present and caused to be presented to F. C. Whitehouse & Company, who were at that time acting as the agents of the Firemen's Insurance Company of Newark, New Jersey, a false and fraudulent claim and proof of loss in support of such claim."

We submit that the only fair and reasonable interpretation that can be given to this language is that the presentation if made at all was made at Newark, New Jersey. The Trial Judge of the United States Court, whose opinion is set out in full in this brief, at the conclusion of this booklet, on this question, said: "A reasonable inference would be that such claim or proofs were presented to the Company at Newark, New Jersey. This would be the more reasonable inference, absent an allegation that the defendants were located in South Dakota, even with such an allegation as to the residence of the agent, under this statute, the information should have charged that the presentation of the false and fraudulent claim and proofs in support thereof were made somewhere within the jurisdiction of the Court."

It appears clearly and without dispute from the record before the Court that the defendant made and placed of record proper and strenuous objections at a proper time to the *form of he information* and to the *introduction of any testimony thereunder* and for an *advised verdict* on the grounds, *among others*: 1. *That no offense was charged in the information, no venue being laid.* 2. That the Court was without jurisdiction all the way through *because the state failed to prove the alleged offense within*

the jurisdiction of the Court or anywhere else in the state of South Dakota or in the United States. Record page 27, 28.

HABEAS CORPUS PROPER REMEDY IN THE CASE AT BAR.

The writer concedes that *habeas corpus* may not be invoked to review irregularities or erroneous rulings or mistakes of judgment by a Trial Court however serious these may be. In other words, the writ of *habeas corpus* may *not be used as a substitute for the writ of error* or instead of it.

The writer insists that where the Trial Court was *without jurisdiction,* as in the case at bar, either at the beginning of the trial or having had *jurisdiction* at the beginning *lost it during the proceedings* in any of the ways provided by law, *that the only real remedy is by haveas corpus.*

A judgment by a Court without jurisdiction is a pure nullity. It is void *Ab Initio Et Ad Finitem, from the beginning and to the end.*

In the case at bar *habeas corpus* was and is the *only remedy* open to the defendant. He *could not* sue out a *writ of error* to this Court from the South Dakota Court under the record in this case.

Because "error" means an honest mistake of judgment and in a Court proceedings it means an honest mistake by a Court that had jurisdiction to pass upon some question either of fact or of law.

A Court without jurisdiction *does not make errors, its rulings are not erroneous.* They are a pure nullity without any force or effect. *They are as if they never were.* The learned Trial Court in discussing this question in his very scholarly and complete opinion, which appears at the conclusion of this booklet said: "It is idle to say that petitioner should be required to seek a review of the proceeding in the state court by writ of error upon a record that obviously could not sustain a judgment of conviction. Moreover, in pursuing its inquiry, the court is warranted in examining all matters that go to the authority

of the court to try and sentence the accused. (*Harlan v. McGourin,* 218 U. S. 442; *Moore v. Dempsey, Supra.*)"

Had the appellee come to this Court with a writ of error this Court could and probably would have summarily *dismissed the writ* on the ground that the *whole proceedings in the Courts of South Dakota were not erroneous but void.* There is no way known to the books whereby a Court wholly without jurisdiction can render a valid judgment or deprive one of his liberty. Nor can it commit an error in a legal sense. It can do nothing.

The mere statement of the facts is a sufficient answer to why *habeas corpus* and not *writ of error* was the proper and only remedy for the petitioner when he went into the United States Court.

"If the Court below was without jurisdiction of the matter upon which the judgment of imprisonment was rendered, or if it exceeded its jurisdiction in the extent of the imprisonment imposed this Court will interfere and discharge the petitioner *on habeas corpus.*" *Justice Field Ex Parte Siebold* 100 U. S. 371.

"It is firmly established that if the Court which renders a judgment has not jurisdiction to render it, either because the proceedings or the law under which they are taken are unconstitutional or for any other reason, the judgment is void and may be questioned collaterally and the defendant who is imprisoned under and by virtue of it may be discharged from custody *on habeas corpus.*" *Ex Parte Nielsen* 131 U. S. 184: *Ex Parte Snow* 120 U. S. 274; *Ex Parte Royal* 117 U. S. 241.

Like decisions with like holdings appear frequently in the books but to the writer it seems unnecessary to call this Court's attention to any further authorities on the propositions which he has thus far laid down.

DUTY OF UNITED STATES COURTS TO INVESTIGATE QUESTIONS.

"In *Castle v. Lewis,* 254 Fed. 915, l. c. 919 and 920, Judge Sanborn, in a learned and exhaustive opinion, said among other things,—"When a person is in custody under the process of a state court for an alleged offense against the laws of such state, and it is claimed (a) that he is in

custody in violation of the Constitution, or of a law or treaty of the United States, or (b) for an act done or omitted to be done by him in pursuance of a law of the United States, the District Courts of the United States and the judges thereof have plenary jurisdiction to inquire into the cause of such confinement by means of the writ of habeas corpus, and to discharge the petitioner if his detention is in violation of the Constitution or of a law or treaty of the United States . . ."

In a very learned and strikingly strong opinion by Mr. Justice Holmes, of this court, in *Moore vs. Dempsey* delivered on February 19th, 1923, there appears the following language touching the point we now have in mind: "We shall not say more concerning the corrective process afforded to the petitioners than that it does not seem to us sufficient to allow a Judge of the United States to escape the duty of examining the facts for himself, which, if true as alleged, make the trial absolutely void."

It is true that Mr. Justice McReynolds wrote a dissenting opinion in that case, in which Mr. Justice Sutherland concurred. But these learned gentlemen did not dissent on the fundamental proposition, that if the Trial Court is without jurisdiction its proceedings are wholly null and void, and that *habeas corpus* is the proper remedy.

In *Ex Parte Van Moore,* 221 Fed. 968, and in *Yohyowan v. Luce,* 291 Fed. 425, the Federal Court interferred by writ of habeas corpus upon the theory that the state court was wholly without jurisdiction. It is true that those cases were cognizable only in the Federal Court but the proceeding as here was based upon the lack of jurisdiction of the state court."

Nowhere in the books can there be found a decision which will deny the right of a United States Court to intervene where a citizen of the country is deprived of his rights under the Constitution and laws of the land through the proceedings of a Court that is without jurisdiction. With the embodiment of the opinion and judgment of the United States District Court which follows, the writer will cite no other authorities or make no further argument.

V. THE OPINION AND JUDGMENT OF THE TRIAL COURT.

"Habeas corpus. Petitioner seeks his discharge from the custody of the respondent, as Sheriff of Minnehaha County, South Dakota. He is under restraint in virtue of a mittimus in the hands of the Sheriff. This instrument was issued out of the Circuit Court of said Minnehaha County and is based upon a judgment of conviction in said Circuit Court, which judgment, petitioner claims, is a nullity.

"On the 3rd day of April, 1922, petitioner was placed on trial in said Court upon an information filed by the Prosecuting Attorney of said county and based upon Section 4271 Rev. Code 1919, of South Dakota, in part as follows:

> "Every person who presents or causes to be presented any false or fraudulent claim, or any proof in support of any such claim, upon any contract of insurance for the payment of any loss . . . is punishable by imprisonment in the state penitentiary, not exceeding three years, or by a fine not exceeding $1000 or both."

"The pertinent allegations of said information are as follows:

"INFORMATION.

State of South Dakota, County of Minnehaha, ss.

In the Circuit Court thereof, Second Judicial Circuit, May Term, A. D. 1920.

The State of South Dakota vs. George W. Egan, Defendant. Information for the crime of presenting false claim and proof of loss.

L. E. Waggoner, State's Attorney of the County of Minnehaha in the Second Judicial Circuit of the State of South Dakota, upon his oath informs the Court:

That the Firemen's Insurance Company of Newark, New Jersey, was at all of the time herein mentioned, a corporation, . . . engaged in the business of insuring property against accidental loss by fire . . . had fully complied with the laws of the State of South Dakota . . . was authorized to do a fire insurance business in

the State of South Dakota . . . and on the 6th day of September, 1919, issued to said George W. Egan its policy of insurance . . . by the terms of which a two and one-half story frame building located on Tracts Four (4) and Five (5) . . . of the Northwest Quarter (NW¼) of Section Thirty-two (32), Township One Hundred One (101), Range Forty-nine (49), Minnehaha County, South Dakota, was insured in the amount of Twenty-five Hundred Dollars ($2500), for the term of one year from and after September 6, 1919, and thereafter . . . on or about November 24, 1919, the said property . . . was consumed and with the exception of the foundation, completely destroyed by fire . . .

And that thereafter, and on or about the 9th day of January, 1920, the said defendant, George W. Egan, then and there did wilfully, unlawfully and feloniously present and cause to be presented to F. C. Whitehouse & Company, who were at that time acting as the agents for the Firemen's Insurance Company of Newark, New Jersey, a false and fraudulent claim and proof in support of such claim . . . wherein and whereby the said defendant represented and claimed that said building . . . had been completely destroyed by fire on the 24th of November, 1919; that the cause of said fire was unknown; that said building was occupied as a residence and summer home; that the value of said building was $30,000; . . .

Whereas, in truth and in fact, each and all of the said statements in said proof of claim were false and fraudulent, and known to be false and fraudulent by the said defendant at the time they were made, in this: . . . the cause of the said fire was at the time known to the said George W. Egan, in that he had caused and procured said fire to be set and started for the purpose and with the intent of destroying said building; and the said George W. Egan had never occupied the said building as a home or summer residence; nor had the said building ever been occupied as a home or summer residence by anybody during the time when the said policy of insurance was in force . . . ; and

Whereas, in truth and in fact, the said building was

not of the value of Thirty Thousand Dollars ($30,000) . . . all of which said false and fraudulent claims and proof of loss were made with the intent upon the part of the said George W. Egan to present and use the same in support of the said George W. Egan's claims against the said Firemen's Insurance Company, and the said defendant did thereby and by said means, commit the crime of presenting a false claim and proof of loss upon a contract of insurance contrary to the form of the statute in such cases made and provided and against the peace and dignity of the State of South Dakota."

"At the beginning of the trial, petitioner asked permission to withdraw his plea of Not Guilty, previously entered, for the purpose of formally demurring to the information. The request was denied, whereupon the petitioner objected "to the introduction of any testimony under the information in this case, because, . . .

3rd,—That said information does not describe a public offense, that no venue is laid and that the Court is without jurisdiction in this case under the information filed herein.

5th,—That the County in which the alleged offense is alleged to have been committed is not stated in said information, and that said information is defective in failing to lay the venue in order to give the Court jurisdiction in the premises."

"This objection was overruled and at the close of the State's evidence, petitioner again challenged the jurisdiction of the Court, adding thereto the further ground that there was a total failure of proof as to the venue of the alleged offense. Again he lost his contention and upon conviction vigorously renewed and stoutly urged his challenge to the jurisdiction of the court in his motion in arrest of judgment and in the Supreme Court on appeal. His contention availed him nothing and having exhausted all his remedies in the State courts, he has resorted to this Court, claiming an infringement of and trespass upon his rights as a citizen, which rights are vouchsafed in Section 1, Article 14, of the Amendments to the National

Constitution, wherein it is provided that no State shall "deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

"Other relevant facts will be stated in the course of the opinion.

MEMORANDUM OPINION

"1. As a postulate to the consideration of this case, it should be noted that in habeas corpus proceedings, as here, the whole inquiry is limited to an examination of fundamental and jurisdictional questions, as the habeas corpus writ cannot be employed as a substitute for a writ of error. (*Ex parte Parks*, 93 U. S. 18; *Harlan v. McGourin*, 218 U. S. 442, l. c. 448; *Collins v. Johnston*, 237 U. S. 502; l. c. 505; *Bens v. U. S.* 266 Fed. 152; *Murray v. U. S.* 273 Fed. 522; *Collins v. Morgan*, 243 Fed. 495; *Biddle v. Luvisch*, 287 Fed. 699; *Ex parte Salinger*, 288 Fed. 752, l. c. 754; *Ex parte, Joly*, 290 Fed. 858.)

"While upon habeas corpus the inquiry only extends to the power and authority of the court to act, not the correctness of its conclusions, yet in ascertaining a jurisdictional fact and whether the judgment is wholly void, the court will pursue its inquiry through the record of the proceedings.

It was said in *Moore v. Dempsey*, 261 U. S. 86, l. c. 92,—

> "It does not seem to us sufficient to allow a Judge of the United States to escape the duty of examining the facts for himself when if true as alleged they make the trial absolutely void."

2. By Section 4725 of the Revised Code of 1919 of South Dakota, it is provided that an "information is sufficient if it can be understood thereform . . .

> "4. That the offense charged was committed within the jurisdiction of the court, or though without the jurisdiction of the court, is triable therein."

"Obviously, the information, being considered, does not meet the test of sufficiency prescribed by this statute. It cannot be sustained upon the most favorable inferences. It charges in substance that the Firemen's Insurance Company, a corporation of Newark, New Jersey, was em-

powered to do business in the State of South Dakota, and in pursuance of its authority insured certain property of the petitioner, located in Minnehaha County; that the property was destroyed by fire and that thereafter petitioner presented a false claim to its agents. It is not alleged where petitioner presented the false and fraudulent claim and proofs in support thereof.

"A reasonable inference would be that such claim and proofs were presented to the Company at Newark, New Jersey. This would be the more reasonable inference, absent an allegation that the agents of the Company were located in South Dakota, and moreover, even with such an allegation as to the residence of the agents, under this statute, the information should have charged that the presentation of the false and fraudulent claim and proofs in support thereof were made somewhere within the jurisdiction of the court, or an allegation as provided by the statute 'though without the jurisdiction of the court, is triable therein.'

"Though by Section 4715 South Dakota Revised Code 1919, all technical forms of pleading in criminal actions have been abolished, yet the lawmakers plainly and unequivocally provided that an information to be sufficient must yield the inference that the offense was committed within the jurisdiction of the court. This is the equivalent of an allegation that the indictment or information must affirmatively show the jurisdiction of the court.

"Apart from the jurisdictional question, the place of the alleged offense should be charged with such clearness and certainty as to afford full notice of the charge and thereby enable the accused to make his defense with reasonable knowledge and to plead the judgment rendered upon the information in bar of any second charge for the same offense. It is a general principle of the law that the place must be alleged with such certainty that it may be seen that the court has jurisdiction of the offense. This is the rule reinforced by Section 4725 of South Dakota's laws.

"It follows from the foregoing that the information, challenged in the State Court and here, stands condemned by statute and is insufficient. Being insufficient, it cannot

sustain a judgment and all proceedings tending thereto are void.

"3. It is the contention of the learned Attorney General, who appears for the respondent, that even if the information did not contain proper jurisdictional averments, yet all questions thereon were foreclosed against the petitioner by his failure to file a formal demurrer. The Court cannot so hold.

"It is provided by Section 4771 South Dakota Revised Code of 1919, that the defendant may demur to an information when it appears upon the face thereof, among other things, 'that the court is without jurisdiction of the offense charged.'

"By Section 4779 South Dakota Revised Code 1919, it is provided that objections, under said Section 4771, can only be taken by demurrer *'except that the objection to the jurisdiction of the court over the subject of the indictment or information, or that it does not describe a public offense may be taken at the trial under the plea of not guilty and in arrest of judgment.'*

"From the above, it is very evident that the lawmakers had in mind the fundamental proposition that jurisdiction cannot be conferred by consent, agreement or waiver, and that therefore a challenge to the jurisdiction of the court could be made at any stage of the proceeding and in any manner.

"An examination of the proceedings in this case, however, discloses that the inferences of the respondent are not justified, nor are the conclusions of the Supreme Court in this regard sustained. At the very threshold of the trial, petitioner requested permission to withdraw his plea of Not Guilty for the purpose of filing a formal demurrer. This request, having been denied him, he thereupon interposed his challenge to the jurisdiction of the court, and thereafter urged his contention with vigor and persistency at every state of the proceeding.

"It does not appear upon the record that petitioner, by his conduct at the trial, waived even his personal rights or that he was estopped from asserting them, either in the state courts or here.

"4. In view of the above, it is not necessary to notice

the contention made in this court that the statute under which petitioner was convicted had been repealed by what is known as the Valued Policy Law. In passing, however, and in view of the analysis of the two provisions made by counsel ,it should be observed that the Valued Policy Law is conclusive only as to the amount written in the policy where the property is wholly destroyed 'without criminal fault on the part of the insured.'

"Section 4271 is leveled against the presentation of a false or fraudulent claim or any proof in support thereof. It would appear from these provisions that the presentation of a false or fraudulent claim or proof in support thereof might lay the foundation for a successful prosecution, notwithstanding the Valued Policy Law. As an illustration, a claim might be presented for the amount specified in the policy where the insured property had not in fact been destroyed at all, or where it is not wholly destroyed by fire, or it could be made the basis of a prosecution where the property had been destroyed by the 'criminal fault on the part of the insured.'

"5. It is finally contended by the respondent that this court should not interfere by habeas corpus but that the petitioner should pursue his remedy by writ of error to the Supreme Court of the United States. This contention would be correct if the state court had jurisdiction of the cause and merely abused the processes of the court and committed irregularities but where, as here, the state court was without jurisdiction to proceed in the premises, its judgment was void and being a nullity, it was subject at any time to collateral attack. The Federal Courts are clothed by statute with power to issue writs of habeas corpus 'for the purpose of an inquiry into the cause of restraint of liberty,' and 'shall proceed in a summary way to determine the facts in the case by weighing the testimony and arguments and thereupon to dispose of the party as law and justice require.'

"It is idle to say that petitioner should be required to seek a review of the proceeding in the state court by writ of error upon a record that obviously could not sustain a judgment of conviction. Moreover, in pursuing its inquiry, the court is warranted in examining all matters that go to the authority of the court to try and sentence the

accused. (*Harlan v. McGourin*, 218 U. S. 442; *Moore v. Dempsey, Supra.*)

"In *ex parte Van Moore*, 221 Fed. 968, and in *Yohyowan v. Luce*, 291 Fed. 425, the Federal Court interferred by writ of habeas corpus upon the theory that the state court was wholly without jurisdiction. It is true that those cases were cognizable only in the Federal Court but the proceeding as here was based upon the lack of jurisdiction of the state court.

"In *Castle v. Lewis*, 254 Fed. 915, l. c. 919 and 920, Judge Sanborn, in a learned and exhaustive opinion, said, among other things,—

> "When a person is in custody under the process of a state court for an alleged offense against the laws of such state, and it is claimed (a) that he is in custody in violation of the Constitution, or of a law or treaty of the United Sates, or (b) for an act done or omitted to be done by him in pursuance of a law of the United States, the District Courts of the United States and the judges thereof have plenary jurisdiction to inquire into the cause of such confinement by means of the writ of habeas corpus, and to discharge the petitioner if his detention is in violation of the Constitution or of a law or treaty of the United States . . . "

"In conclusion it should be stated that it was the right and duty of this court to make inquiry into the question of proof of venue in the trial of petitioner and this was done.

"There was no evidence that the alleged offense was committed at any place within the jurisdiction of the trial court and such failure of proof could have been adjudged sufficient to oust the state court of jurisdiction, even if the information had contained proper jurisdictional averments.

"In view of the premises, it is the order of the court that the petitioner be discharged from the custody of the Sheriff of Minnehaha County, South Dakota, and that his

bond heretofore taken, pending this proceeding, be exonerated *and the sureties discharged.*

"Kansas City, Missouri, April 1st, 1924.

"ALBERT L. REEVES,
"United States District Judge."

The above and foregoing from the pen of the learned United States District Judge appellee makes a part of his brief and argument and offers the same to this Court as such.

The writer should call the attention of this Court to the fact that its rule required the appellant to serve his brief and argument on appellee at least three weeks before the case was assigned for final hearing in this Court, which was definitely stated as April 13th, 1925. Those opposing appellee served no brief or argument until on the afternoon of March 30th, 1925, which was just two weeks before the day set for final hearing before this Court. It was therefore necessary in order that appellee might comply with the rules of this Court by having his brief and argument on file one week before April 13th, 1925, that he should have the same printed and with the Clerk in Washington not later than the morning of April 6th, 1925. It takes at least forty-eight hours to deliver a package from Sioux Falls, South Dakota, into the hands of the Clerk of this Court. So it will readily appear that appellee has been placed at a great disadvantage in the preparation and presentation of his brief and argument not having had the advantage of a perusal of the showing of those opposed to him. These facts, the writer is certain, will be properly considered by this Court. Appellee is very much of the opinion under the rules of this Court the brief of his opponents should be stricken by the Court.

On the whole Record, under the well settled law and for reasons assigned I am certain that this appeal should and will be dismissed and the Opinion and Judgment of Judge Albert L. Reeves, affirmed.

Respectfully submitted,

GEO. W. EGAN, *Pro Se Se.*

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1924.

No. 622

VINCENT L. KNEWEL, AS SHERIFF OF MINNEHAHA COUNTY, SOUTH DAKOTA, APPELLANT,

vs.

GEORGE W. EGAN.

MOTION BY APPELLEE TO DISMISS THE APPEAL AND TO STRIKE BRIEF OF APPELLANT, ETC.

GEORGE W. EGAN,
Counsel pro Se.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1924.

No. 622

VINCENT L. KNEWEL, APPELLANT,

vs.

GEO. W. EGAN, APPELLEE.

Affidavit of Geo. W. Egan.

STATE OF SOUTH DAKOTA,
County of Minnehaha, ss:

Geo. W. Egan, first being duly sworn, states that a copy of the within Motion, together with a copy of the Affidavit of Vincent L. Knewel, and the Affidavit of Geo. W. Egan, was by him this day enclosed in an envelope, properly stamped, properly addressed to B. S. Payne, Pierre, South Dakota, and sent by registered mail to him, registry receipt pasted hereto as a part hereof.

GEO. W. EGAN.

Subscribed and sworn to before me this 7th day of April, 1925.

[SEAL.] OLIVE L. GEIGER,
Notary Public.

My commission expires Nov. 14, 1928.

[Attached to sheet of copy was Post Office return receipt dated April 7, 1925, numbered 18873 showing registry of mailing, also Return Card showing receipt, 18873, by Byron S. Payne, by Gertrude Bedesse to be returned to Geo. W. Egan, Sioux Falls, S. Dak., dated April 8, stamped Pierre, S. Dak.—Printer.]

IN THE

SUPREME COURT OF THE UNITED STATES.

Case No. 622.

VINCENT L. KNEWEL, *Appellant,*

vs.

GEO. W. EGAN, *Appellee.*

Motion by Appellee, Geo. W. Egan.

Comes now Geo. W. Egan, appellee herein, and respectfully moves this Court for the following affirmative relief:

1. For an order striking the brief and argument filed by B. F. Jones, B. S. Payne, *et al.*, claiming to be in behalf of the appellant, Vincent L. Knewel, because they do not appear for him and have no authority to prepare or present any brief or make any appearance for said appellant Knewel.

2. For an order dismissing this appeal for the reason that the appellant is not represented and appellant, Vincent L. Knewel, disclaimed in writing any interest in the appeal in the form of a written motion which was served on appellee on December 15, 1924.

3. For an order that appellee may have his costs and disbursements. Reference in this motion being to the original motion of Vincent L. Knewel lodged with the Clerk of this Court for filing on December 31, 1924, and to the affidavits of Vincent L. Knewel and Geo. W. Egan, attached to this motion and made a part hereof.

GEO. W. EGAN,
Attorney pro Se Se.

IN THE

SUPREME COURT OF THE UNITED STATES.

Case No. 622.

VINCENT L. KNEWEL, *Appellant*,

vs.

GEO. W. EGAN, *Appellee.*

Affidavit of Vincent L. Knewel.

STATE OF SOUTH DAKOTA,
County of Minnehaha, ss:

Vincent L. Knewel, first being duly and solemnly sworn on his oath, states that he is the same Vincent L. Knewel who appears as appellant in Knewel *vs.* Egan, now pending in the Supreme Court of the United States; that when the writ in the *habeas corpus* case was served on him on December 1, 1924, that on the 3d day of December following he communicated with Hugh S. Gamble, State's Attorney of Minnehaha County, and asked Mr. Gamble to represent him in the *habeas corpus* hearing; that he never at any time employed or engaged any other attorney than said Hugh S. Gamble; that B. L. Jones and B. S. Payne, of the Attorney General's office, came into the case without affiant's knowledge or consent; that they took charge of the case for affiant without any request on affiant's part and practically crowded affiant's attorney out of the case; that affiant did not want to

appeal this case after he had read the opinion of Judge Albert L. Reeves, of Kansas City. The opinion seemed right to affiant, but B. F. Jones and B. S. Payne told affiant that they were going to appeal and could appeal without him, and because of that they induced appellant to appeal the case; that later affiant took counsel with the most competent lawyers he could get and was advised by them that Judge Reeves had stated the law. Affiant then thought that any appeal would only be to harass and persecute Egan and he did not want to be a party to any such proceeding, because he knew that B. F. Jones and B. S. Payne were personally unfriendly to Egan. That as soon as affiant received a statement from the Clerk of the United States Court as to the amount of costs due to Egan as a result of the trial before Judge Reeves, affiant paid the costs to Egan. Affiant had his attorneys prepare a motion for him to dismiss this case in the United States Court. He served the motion on Egan and then sent the motion with a personal letter to the Clerk of the United States Court at Washington, asking him to file the same and call the Court's attention to the motion. Affiant still wants this case dismissed. There are no lawyers appearing for appellant in the Supreme Court with his consent or at his request. Affiant has learned by hearsay that B. F. Jones and B. S. Payne, or somebody acting for them, have filed a motion to substitute George Boardman as appellant instead of this affiant. Affiant has received no notice of any such motion and knows nothing about it; is not a party to it and does not authorize it. Affiant has also learned by hearsay that the same parties have filed a motion for the State of South Dakota to intervene in this case, but affiant has received no notice of any

such proceeding and knows nothing about it; does not consent to it, and specifically objects and opposes the substitution of George Boardman or the intervention of the State of South Dakota, and requests that this case be dismissed on his motion.

VINCENT L. KNEWEL.

Subscribed and sworn to before me this 10th day of March, 1925.

[SEAL.] N. O. MONSERUD,
Notary Public.

STATE OF SOUTH DAKOTA,
County of Minnehaha, ss:

Geo. W. Egan, first being duly sworn on his oath, states that he is appellee in the case entitled Knewel *vs.* Egan, in the United States Supreme Court; that on this 30th day of March, 1925, he received through the mail from B. S. Payne, at Pierre, South Dakota, a copy of "Brief for Appellant"; that this case has been assigned for hearing on April 13, 1925, for several months; that there is but two weeks between this date and the date of the hearing on said case; that the rules prescribe that appellee shall have served upon him or his counsel copy of appellant's brief three weeks before the hearing; that this brief should be stricken from the files as being in violation of the rules of this Court.

That this case should be dismissed on appellee's motion because the real and only appellant, Knewel, served on Appellee on December 15, 1924, his Motion to dismiss the same, and as affiant believes and is creditably informed, said Motion

was lodged with the Clerk of the Supreme Court at Washington on December 31, 1924.

That when the costs in the United States District Court were taxed by its Clerk, Jerry Carleton, of Sioux Falls, in favor of appellee, Knewel, appellant, personally paid said costs to this appellee; that the State of South Dakota or the County of Minnehaha did not pay these costs or anything else so far as this affiant knows; that the State of South Dakota did not seek to intervene at the trial in this case nor was any Order of Intervention or Substitution considered by the United States District Court.

GEO. W. EGAN.

Subscribed and sworn to before me this 30th day of March, 1925.

[SEAL.] OLIVE L. GEIGER,
Notary Public.

My commission expires Nov. 14, 1928.

[Endorsed:] File No. 30,587. Supreme Court U. S., October Term, 1924. Term No. 622. Vincent L. Knewel, as Sheriff, etc., Appellant, *vs.* Geo. W. Egan. Motion by appellee to dismiss the appeal and to strike brief of appellant, etc., with notice and affidavit of service. Filed April 13, 1925.